INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Argument:	
1. No. 232	8
2. No. 233	10
Conclusion	12
Appendix	13

CITATIONS

Cases:

Atlas Engine Works, Inc. v. *National Labor Relations Board*, 68 LRRM 2635	9
Humphrey v. *Smith*, 336 U.S. 695	11
Joy Silk Mills v. *National Labor Relations Board*, 185 F. 2d 732, certiorari denied, 341 U.S. 914	9
Mine Workers v. *Eagle-Picher Co.*, 325 U.S. 335	2
National Labor Relations Board v. *Atco-Surgical Supports, Inc.*, 68 LRRM 2200	9
National Labor Relations Board v. *Ben Duthler, Inc.*, 68 LRRM 2324	9
National Labor Relations Board v. *Winn-Dixie Stores, Inc.*, 341 F. 2d 750, certiorari denied, 382 U.S. 830	9
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	11

Statutes:

Administrative Procedure Act, as amended, 5 U.S.C. (Supp. II) 554(d)	11

Statutes—Continued

	Page
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*)	3
Section 3(d)	11, 13
Section 8(a)(1)	3, 6, 7, 8, 9, 11, 13
Section 8(a)(3)	6, 7, 8, 9, 11
Section 8(a)(5)	7, 9, 13
Section 9(a)	13
Uniform Code of Military Justice, 10 U.S.C. 827(a)	11

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 232

RETAIL STORE EMPLOYEES UNION LOCAL 954, PETITIONER

v.

LANE DRUG COMPANY, A DIVISION OF A. C. ISRAEL COMMODITY CORPORATION, ET AL.

No. 233

LANE DRUG COMPANY, A DIVISION OF A. C. ISRAEL COMMODITY CORPORATION, ET AL., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND RETAIL STORE EMPLOYEES UNION LOCAL 954

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. No. 232, 1a-14a) is reported at 391 F. 2d 812. The Board's decision and order (Pet. App. No. 232, 15a-80a) are reported at 160 NLRB 1147.

JURISDICTION

The decree of the court of appeals was entered on March 29, 1968 (Pet. App. No. 233, 32). The petitions for writs of certiorari in both cases were filed on June 26, 1968.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. In No. 232, whether the court below properly set aside, as unsupported by substantial evidence, the finding of the National Labor Relations Board that the Companies' refusal to recognize and bargain with the Union was not motivated by a good faith doubt as to the Union's majority status.

2. In No. 233, whether it is in derogation of due process for an attorney on the staff of the Board's General Counsel to investigate unfair labor practice charges filed with the agency and to prosecute a complaint which subsequently ensues.

---

[1] Petitioners in No. 232 (the "Union") were permitted to intervene in the court of appeals by order entered on October 12, 1966, and thus have standing to file the petition in that case. *Mine Workers* v. *Eagle-Picher Co.*, 325 U.S. 335, 338.

3. In No. 233, whether substantial evidence supports the Board's findings, as upheld by the court below, that the Companies, in violation of Section 8(a)(1) of the National Labor Relations Act, coerced and restrained their employees in the exercise of their organizational rights.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the Appendix, *infra*, pp. 13-14.

STATEMENT

Petitioners in No. 233 ("the Companies") are a single integrated enterprise operating 17 retail drug stores in the Toledo, Ohio, area (J.A. 498).[2] Beginning in November 1964, pharmacist Nupp made several attempts to organize the Companies' pharmacists but withheld further action when Vice-President Kaye, who knew of Nupp's activities, promised to settle the pharmacists' grievances and to give Nupp a substantial loan provided the pharmacists refrained from forming a union.[3] During several conversations Kaye also mentioned to Nupp that he was "managerial material," and that if Nupp was not satisfied with his salary "something could be arranged * * *" (J.A. 535a-538a; 228a-229a). In April 1965, Nupp re-

[2] "J.A." references are to the Joint Appendix in the court below.

[3] J.A. 531a-538a; 123a, 207a, 224a-229a, 231a, 281a-282a, 306a-309a, 315a-317a, 461a-464a, 470a-471a, 483a-489a.

sumed his efforts to organize the pharmacists and conducted a meeting where his fellow employees authorized him to make contacts with local unions. About this time, General Manager Pethke told Nupp that it was none of his business what he felt about his colleagues and that he should resign.[4] Nupp then spoke to the Union and arranged for an organizing meeting with a Union official to be held on April 28, 1965. The Companies' officials had knowledge of his activities and of the meeting date, and discharged Nupp summarily at the end of his shift on the eve of the union meeting.[5]

At the organizational meeting on April 28, 1965, 16 pharmacists signed cards authorizing the Union to represent them, and three additional pharmacists signed cards by May 7.[6] On April 29, 1965, the Union, in a wire to "Lane Drug Co.," demanded recognition and bargaining on behalf of the pharmacists "in Greater Toledo and Bowling Green stores," and on May 4 it sent a wire to "Kaye, President Lane Drug Co.," repeating its demands on behalf of the same group of employees and offering to prove its majority through the Toledo Labor Management Relations Committee.[7] At that date the appropriate bargaining

---

[4] J.A. 540a-541a; 123a-125a, 233a-236a, 280a-283a, 301a-309a.

[5] J.A. 544a, 558a-563a; 239a-241a, 284a, 386a-392a, 400a-401a, 443a, 457a-459a, 482a-483a.

[6] J.A. 543a-546a, 568a, 608a; 82a, 102a-103a, 108a-110a, 125a, 202a-204a, 253a-254a, 242a-243a, 286a-287a, 291a.

[7] J.A. 554a, 584a, 608a; 80a-82a, 98a-99a, 466a-467a, 499a-500a.

unit consisted of 32 pharmacists, of whom the Union represented 17.[8] The Companies wrote the Union on May 12, 1965, that they had "reason to doubt" the Union represented a majority of the pharmacists, and on the same day filed a representation petition with the Board claiming that the appropriate unit consisted of 25 pharmacists at their drug stores in Toledo and vicinity (J.A. 551a, 583a; 490a, 501a).

Subsequent to Nupp's discharge, Supervisor Wagenman asked a pharmacist who had been at the organizational meeting whether anybody had signed cards, and requested that pharmacist to keep him posted of further developments. He added that Nupp had been nothing but a troublemaker and should have been fired long ago (J.A. 546a; 125a-127a). Supervisor Willis questioned other pharmacists about the attendance at the meeting and the signing of cards (J.A. 546a-547a; 108a, 431a-435a). After the Union held another meeting on May 9, Vice-President Kaye approached a number of pharmacists[9] and asked them to abandon the Union (J.A. 549a). He specificaly requested pharmacist Maza to prevail on his colleagues in this regard (J.A. 548a-549a, 606a).

About 20 pharmacists went out on strike to protest Nupp's discharge on May 14, 1965, and 10 of the

---

[8] J.A. 564a-568a, 608a; 108a-110a, 141a-142a, 144a-147a, 153a-155a, 190a-195a, 202a-204a, 253a-254a, 280a-287a, 501a, 451a-457a, 496a-503a; General Counsel's exhibits 3D, 3J, 3S.

[9] Maza (J.A. 102a-104a, 111a, 512a-513a); Nemetz (J.A. 127a-128a); Eisenhauer (J.A. 307a-308a); Hubbard (J.A. 104a-141a); Molnar (J.A. 293a-294a); and Baumgartner (J.A. 323a).

Companies' store were picketed.[10] During the strike, which lasted until May 28, Vice-Presidents Kaye and Rivelis and other supervisory employees approached several strikers and asked them to return to work and to discuss their grievances with the Companies on an individual basis, without resort to the Union.[11] Vice-President Kaye also stated that the Companies would never allow a union to be formed no matter what the cost, and President Amster wrote to all pharmacists that if they had problems they should talk to him directly instead of through a go-between and that he would "not talk to any Union organizer or outsiders." [12]

On the basis of these facts, unfair labor practice charges were filed against the Companies. Upon consideration of the evidence, the Board found that the Companies had violated Section 8(a)(1) and (3) of the Act by: (1) coercively interrogating employees; (2) promising them economic benefits if they dealt individually with the Companies; (3) enlisting employees to engage in surveillance and to dissuade other employee from supporting the Union; (4) soliciting employes to deal directly with the Companies instead of through a union; (5) threatening employees with economic detriment for continuing their union affiliation and endeavors to bargain collectively; and (6)

---

[10] J.A. 551a-552a, 600a; 90a-91a, 114a, 116a, 140a, 160a, 286a.

[11] 552a-553a, 556a; 105a-107a, 114a-115a, 157a-158a, 204a-207a.

[12] J.A. 552a, 556a; 107a, 506a-507a.

discharging Nupp (J.A. 558a-563a, 590a-591a, 606a). The Board further found that 17 out of 32 employees in the appropriate bargaining unit had validly authorized the Union to represent them for collective bargaining purposes by May 4, 1965, and that the Companies' refusal to recognize and bargain with the Union on and after that date violated Section 8(a)(5) and (1) since motivated not by a good faith doubt as to the Union's majority status, but rather by a desire to gain time in order to defeat the Union (J.A. 583a-590a, 607a-608a). The Board ordered the Companies to cease and desist from the unfair labor practices found, to offer reinstatement with back pay to Nupp, to bargain with the Union upon request, and to post appropriate notices (J.A. 593a-597a, 608a-609a).

Upon review, the court of appeals sustained the Board's findings, except in one respect,[13] that the Companies had violated Section 8(a)(1) and (3) of the Act and enforced that part of the order directing the Companies to remedy these violations (Pet. App. No. 233, 21, 22-24, 25-26, 32).

The court below, however, refused to enforce the Board's order requiring the Companies to bargain with the Union, rejecting as unsupported by the record the Board's subsidiary finding that the Companies' refusal to bargain with the Union was not motivated by a good faith doubt as to the Union's majority status (Pet. App. No. 233, 26-31). In the court's

[13] The court below set aside the Board's finding that the Companies had coercively interrogated employees (Pet. App. No. 232, 8a).

view, the Companies' officials could fairly have had such doubt because of: (1) the statement of a supervisor that several employees had told him that not many pharmacists were interested in the Union (*id.* at 27); (2) the decisive loss of an election by the Union in 1954 conducted in a different bargaining unit of the Companies' employees (*ibid.*); (3) the Union's "hurried" filing of a refusal to bargain charge on the first work day after its request for recognition (*id.* at 28); (4) the existence of a majority, "by a slim margin," a few days after such request (*ibid.*); (5) the lack of clarity in the Union's bargaining demands, which did not mention the stores operated by Lane affiliates in Sylvania and Oregon (*id.* at 29); (6) and because it was not wholly clear whether the pharmacist-managers and assistant managers (who the Board ultimately found were supervisors) and certain other named employees were in the bargaining unit (*id.* 29-30). The fact that the employer engaged in unfair labor practices violative of Section 8(a)(1) and (3) of the Act was not, in the court's view, in itself sufficient reason to negative the Companies' asserted good faith doubt about the Union's majority status (*id.* at 31).

ARGUMENT

1. No. 232. Although the Board agrees with the Union that the court of appeals erred in refusing to enforce the Board's bargaining order, it has not sought review of this issue by this Court. The court below rejected the Board's finding that the Companies' refusal to recognize and bargain with the Union

was not motivated by a good faith doubt as to the Union's majority.[14] In the Board's view, the court's holding in this regard rests, at least in part, on grounds which are of doubtful validity and improperly discounts the significance of the Companies' contemporaneous unfair labor practices in assessing their good faith. For example, the statement of the court below that the "fact that the employer committed unfair labor practices in violation of Sections 8(a)(1) and 8(a)(3) is not of itself sufficient reason to negative a good faith doubt" (Pet. App. No. 233, 31) is questionable. However, the issue of the Companies' good faith in rejecting the Union's request for recognition is essentially evidentiary. Moreover, subsequent decisions of the Sixth Circuit make clear that it did not intend to take the position here that other unfair labor practices are irrelevant in determining good or bad faith.[15]

Petitioner further asserts that the instant case provides a suitable vehicle for resolving the alleged conflict among circuits regarding the significance to be accorded union authorization cards in bargaining

---

[14] Absent such good faith doubt, an employer violates Section 8(a)(5) of the Act where, as here, he refuses to recognize and bargain with a union which in fact represents a majority of his employees in an appropriate unit. See *Joy Silk Mills* v. *National Labor Relations Board*, 185 F. 2d 732, 741 (C.A.D.C.), certiorari denied, 341 U.S. 914, and *National Labor Relations Board* v. *Winn-Dixie Stores, Inc.*, 341 F. 2d 750, 755 (C.A. 6), certiorari denied, 382 U.S. 830.

[15] See *National Labor Relations Board* v. *Atco-Surgical Supports, Inc.*, 68 LRRM 2200, 2201; *National Labor Relations Board* v. *Ben Duthler, Inc.*, 68 LRRM 2324, 2326; *Atlas Engine Works, Inc.* v. *National Labor Relations Board*, 68 LRRM 2635.

order cases (Pet. No. 232, 9-17). As petitioner correctly points out (Pet. 10), review by this Court in three such cases was sought unsuccessfully last term. Despite reservations about the soundness of the court's evaluation of the substantiality of the evidence on the good faith doubt issue, the Board recognizes the presence here of various factual considerations which provide some support for the court's conclusion. Since the authorization card matter is only one among such factors, and since the court below did not purport to resolve definitively the significance of that factor in bargaining order cases (see Pet. App. No. 233, 31), the Board does not view this case as an appropriate one in which to seek again review of this issue by this Court.

Accordingly, in light of the foregoing considerations, we do not believe that further review is appropriate.

2. No. 233. The Companies' petition, as they virtually acknowledge (Pet. No. 233, 16-17), presents no issue warranting review by this Court. Indeed, they seek certiorari only if the petition in No. 232 should be granted (see Pet. 1, 17).

a. The Companies' principal contention (Pet. 6-15) is that the dual capacity in which counsel for the agency served—as investigator of the unfair labor practice charges filed against the Companies and as prosecutor of the complaint issued against them, which was based thereon—offends due process. That argument is insubstantial. There is nothing in the Act which bars an attorney who, on behalf of the Board's General Counsel, has investigated unfair labor

practice charges from serving as trial counsel in the event a complaint issues on those charges. The statute, in Section 3(d), vests in the General Counsel the authority to investigate charges, issue complaints and prosecute such complaints. Nor is there any inherent reason—certainly none of constitutional stature—why Board counsel should be barred from serving in this dual capacity. The Companies' assertion (Pet. 10) that such dual capacity "will inevitably lead to the issuance (or non-issuance as the case may be) of complaints regardless of the evidence" is wholly speculative. Finally, no claim is made here that there "was unfairness in the * * * trial itself" (*Humphrey* v. *Smith*, 336 U.S. 695, 697).[16]

b. The Companies' further contention (Pet. 15-16) that certain of the Board's findings are inadequately supported by the record presents no issue warranting review.[17] *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In the light of the facts detailed previously, it is evident that the court below correctly concluded that those findings were supported by substantial evidence.

---

[16] Section 5(c) of the Administrative Procedure Act, as amended (5 U.S.C. (Supp. II) 554(d)), which bars an officer, employer or agent of an administrative agency, engaged in the performance of investigative or prosecutory functions for the agency, from participating in the decision of the agency on the merits, has no relevance to petitioners' contention and no application whatever to the facts involved here. Nor has the Uniform Code of Military Justice (10 U.S.C. 827(a), to which petitioner also makes reference (Pet. 9).

[17] No challenge is made to the Section 8(a)(3) finding based on the discharge of Nupp.

CONCLUSION

Neither petition for a writ of certiorari presents any issue warranting review, and the petitions therefore should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

HANS J. LEHMANN,
Attorney,
National Labor Relations Board.

JULY 1968.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

> Sec. 3(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.
>
> * * * *
>
> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * *
>
> Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate

for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 314314 50